PATENT
Attorney Docket No. 05725.0993-00

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:	) Group Art Unit: 1611
Sandrine DECOSTER et al.	) Examiner: Gina C. Yu
Application No. 10/018,769	)
Filed: December 21, 2001	) Confirmation No. 2464
For: COMPOSITION CONTAINING AN OPACIFIER OR PEARLESCENT AGENT AND AT LEAST TWO FATTY ALCOHOLS	)

Attention: Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

VIA EFS WEB

Sir:

APPEAL BRIEF UNDER BOARD RULE § 41.37

In support of the Notice of Appeal filed with a Pre-Appeal Brief Request for Review on October 19, 2009, further to Board Rule 41.37, and subsequent to the mailing of a Notice of Panel Decision from Pre-Appeal Brief Review ("Notice") on December 29, 2009, Appellants present this brief and are electronically paying the fee of $540.00, required under 37 C.F.R. § 41.20(b)(2), by credit card via EFS Web.

The Notice reset the period for filing this Appeal Brief to one month from the mailing date of the Notice. This Appeal Brief is being filed concurrently with a petition for a two-month extension of time, and the appropriate fee is being electronically paid by credit card via EFS Web. Thus, the period for filing this Appeal Brief now extends through March 29, 2010, and this Appeal Brief is timely filed.

This Appeal responds to the May 19, 2009, final rejection of claims 18, 20-28, and 30-51.

If any additional fees are required or if the electronic payment submitted herewith is insufficient, Appellants request that the required fees be charged to our Deposit Account No. 06-0916.

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Real Party In Interest

Assignee L'Oréal S.A., duly organized under the laws of France and having its principal place of business at 14, rue Royale, 75008 Paris, France, is the real party in interest, as evidenced by the assignment recorded on December 21, 2001, at Reel 012725, Frame 0622

Related Appeals and Interferences

There are currently no other appeals or interferences, of which Appellants, Appellant's legal representatives, or Assignee are aware, that will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

Status Of Claims

Claims 18, 20-28, and 30-51 are pending and stand rejected under 35 U.S.C. § 103(a). Claims 1-17, 19, and 29 are cancelled. Claims 18, 20-28, and 30-51 are the subject of this appeal.

Status Of Amendments

No claim amendments were filed subsequent to the mailing of a Final Office Action on May 19, 2009.

Summary Of Claimed Subject Matter

An embodiment of the present disclosure, as recited in **independent claim 18**, is directed to a cosmetic composition comprising, in a cosmetically acceptable medium, at least one surfactant base, at least one saturated linear C_{22} fatty alcohol, at least one saturated linear C_{18} fatty alcohol present in said composition in an amount by weight ranging from 0.3% to 10%, relative to the total weight of said composition, and at least one of an opacifier and a pearlescent agent, wherein:

- said C_{18} fatty alcohol and said C_{22} fatty alcohol are present in a ratio of 0.15 to 20, and
- said at least one of an opacifier and a pearlescent agent is chosen from:

A) fatty dialkyl ethers which are solid at a temperature of less than or equal to 30°C;

B) alcohols containing from 27 to 48 carbon atoms and comprising one or two groups chosen from: ether, thioether and sulfoxide groups, wherein said alcohols correspond to formula (II):

$R1\text{-}X\text{-}[C_2H_3(OH)]\text{-}CH_2\text{-}Y\text{-}R2$ (II)

in which

R1 and R2, independently of each other, are chosen from linear C_{12} to C_{24} alkyl groups,

X is chosen from an oxygen atom, a sulfur atom, a sulfoxide, and a methylene group,

Y is chosen from an oxygen atom, a sulfur atom, a sulfoxide, and a methylene group,

with the provisos that:

when Y is a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 24 to 44 carbons inclusive,

when Y is not a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 24 to 44 carbons inclusive,

if either X or Y is sulfoxide, then the other of X or Y is not sulfur; and

C) acyl derivatives chosen from ethylene glycol monostearate and ethylene glycol disearate.

Support for this subject matter can be found, for example, at page 3, line 25, through page 5, line 9, and page 6, line 6, through page 8, line 22.

Another embodiment of the present disclosure, as recited in **independent claim 47**, is directed to a suspension agent for a conditioner which is insoluble in a cosmetic composition, said suspension agent comprising at least one saturated linear C_{22} fatty alcohol, at least one saturated linear C_{18} fatty alcohol present in said composition in an amount by weight ranging from 0.3% to 10%, relative to the total weight of said composition, and at least one of an opacifier and a pearlescent agent, wherein:

- said C_{18} fatty alcohol and said C_{22} fatty alcohol are present in a ratio of 0.15 to 20, and
- said at least one of an opacifier and a pearlescent agent is chosen from:

A) fatty dialkyl ethers which are solid at a temperature of less than or equal to 30°C;

B) alcohols containing from 27 to 48 carbon atoms and comprising one or two groups chosen from: ether, thioether and sulfoxide groups, wherein said alcohols correspond to formula (II):

$R1\text{-}X\text{-}[C_2H_3(OH)]\text{-}CH_2\text{-}Y\text{-}R2$ (II)

in which

R1 and R2, independently of each other, are chosen from linear C_{12} to C_{24} alkyl groups,

X is chosen from an oxygen atom, a sulfur atom, a sulfoxide, and a methylene group,

Y is chosen from an oxygen atom, a sulfur atom, a sulfoxide, and a methylene group,

with the provisos that:

when Y is a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 24 to 44 carbons inclusive,

when Y is not a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 24 to 44 carbons inclusive,

if either X or Y is sulfoxide, then the other of X or Y is not sulfur; and

C) acyl derivatives chosen from ethylene glycol monostearate and ethylene glycol disearate.

Support for this subject matter can be found, for example, at page 3, line 25, through page 5, line 9, and page 6, line 6, through page 8, line 22.

Another embodiment of the present disclosure, as recited in **independent claim 49**, is directed to a method for giving a pearlescent effect to or improving the pearlescent effect of a composition comprising at least one of an opacifier and a pearlescent agent, and optionally at least one surfactant base, said method comprising combining at least one saturated linear C_{22} fatty alcohol and at least one saturated linear C_{18} fatty alcohol present in said composition in an amount by weight ranging from 0.3% to 10%, relative to the total weight of said composition, wherein:

- said C_{18} fatty alcohol and said C_{22} fatty alcohol are present in a ratio of 0.15 to 20, and
- said at least one of an opacifier and a pearlescent agent is chosen from:

A) fatty dialkyl ethers which are solid at a temperature of less than or equal to 30°C;

B) alcohols containing from 27 to 48 carbon atoms and comprising one or two groups chosen from: ether, thioether and sulfoxide groups, wherein said alcohols correspond to formula (II):

$R1\text{-}X\text{-}[C_2H_3(OH)]\text{-}CH_2\text{-}Y\text{-}R2$ (II)

in which

R1 and R2, independently of each other, are chosen from linear C_{12} to C_{24} alkyl groups,

X is chosen from an oxygen atom, a sulfur atom, a sulfoxide, and a methylene group,

Y is chosen from an oxygen atom, a sulfur atom, a sulfoxide, and a methylene group,

with the provisos that:

when Y is a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 24 to 44 carbons inclusive,

when Y is not a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 24 to 44 carbons inclusive,

if either X or Y is sulfoxide, then the other of X or Y is not sulfur; and

C) acyl derivatives chosen from ethylene glycol monostearate and ethylene glycol disearate.

Support for this subject matter can be found, for example, at page 3, line 25, through page 5, line 9, and page 6, line 6, through page 8, line 22.

A further embodiment of the present disclosure, as recited in **independent claim 50**, is directed to a method for treating a keratin material comprising applying to said keratin material a composition comprising, in a cosmetically acceptable medium, at least one surfactant base, at least one saturated linear C_{22} fatty alcohol, at least one saturated linear C_{18} fatty alcohol present in said composition in an amount by weight ranging from 0.3% to 10%, relative to the total weight of said composition, and at least one of an opacifier and a pearlescent agent, optionally followed by rinsing with water, wherein:

- said C_{18} fatty alcohol and said C_{22} fatty alcohol being present in a ratio of 0.15 to 20, and

- said at least one of an opacifier and a pearlescent agent is chosen from:

A) fatty dialkyl ethers which are solid at a temperature of less than or equal to 30°C;

B) alcohols containing from 27 to 48 carbon atoms and comprising one or two groups chosen from: ether, thioether and sulfoxide groups, wherein said alcohols correspond to formula (II):

$R1\text{-}X\text{-}[C_2H_3(OH)]\text{-}CH_2\text{-}Y\text{-}R2$ (II)

in which

R1 and R2, independently of each other, are chosen from linear C_{12} to C_{24} alkyl groups,

X is chosen from an oxygen atom, a sulfur atom, a sulfoxide, and a methylene group,

Y is chosen from an oxygen atom, a sulfur atom, a sulfoxide, and a methylene group,

with the provisos that:

when Y is a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 24 to 44 carbons inclusive,

when Y is not a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 24 to 44 carbons inclusive,

if either X or Y is sulfoxide, then the other of X or Y is not sulfur;

and

C) acyl derivatives chosen from ethylene glycol monostearate and ethylene glycol disearate.

Support for this subject matter can be found, for example, at page 3, line 25, through page 5, line 9, and page 6, line 6, through page 8, line 22.

Grounds of Rejection

Claims 18, 20-28, and 30-51 are rejected under 35 U.S.C. § 103(a) as being unpatentable over WO 99/13830 ("Mitsumatsu") in view of JP 401009916 ("Oshima") and WO 98/03155 ("Sebag"). *See* May 19, 2009, Final Office Action at 2. This is the single ground of rejection to be reviewed in this appeal.

Argument

In the Final Office Action mailed May 19, 2009, claims 18, 20-28, and 30-51 were rejected under 35 U.S.C. § 103(a) as being unpatentable over WO 99/13830 ("*Mitsumatsu*") in view of JP 401009916 ("*Oshima*") and WO 98/03155 ("*Sebag*"). Final Office Action at 2. In response, Appellants present arguments set forth below arranged under subheadings, in accordance with 37 C.F.R. § 41.37(c)(1)(vii). Each claim of the present application is separately patentable, and upon issuance of a patent will be entitled to a separate presumption of validity under 35 U.S.C. § 282.

I. Criteria for Rejection under 35 U.S.C. § 103(a)

Several basic factual inquiries must be made in order to determine the obviousness or non-obviousness of claims under 35 U.S.C. § 103. These factual inquiries, set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17, 148 U.S.P.Q. 459, 467 (1966), require the Examiner to:

(1) Determine the scope and content of prior art;

(2) Ascertain the differences between the prior art and the claims in issue;

(3) Resolve the level of ordinary skill in the pertinent art; and

(4) Evaluate evidence of secondary considerations.

The obviousness or non-obviousness of the claimed invention is then evaluated in view of the results of these inquiries. *Graham*, 383 U.S. at 17-18, 148 U.S.P.Q. 467; see also *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1730, 82 U.S.P.Q.2d 1385, 1388 (2007).

Indeed, the "key to supporting any rejection under 35 U.S.C. § 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious.

M.P.E.P. § 2142, 8th Ed., Rev. 6 (September 2007). It is important to note that the prior art references relied upon in a rejection "must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention," when such reasons are articulated by the Examiner. *Graham*, 383 U.S. at 17, 148 U.S.P.Q. 467; *See also* M.P.E.P. § 2141.03(VI), 8th Ed., Rev. 6 (September 2007). Notably, the rationale required to support a conclusion of obviousness is that one of "ordinary skill in the art would have been motivated to combine the prior art to achieve the claimed invention **and that there would have been a reasonable expectation of success**." *DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1360, 80 USPQ2d 1641, 1645 (Fed. Cir. 2006)(emphasis added). If there is no reasonable expectation of success, then the rationale cannot be used to support a conclusion that the claim would have been obvious to one of ordinary skill in the art. *See* M.P.E.P. § 2141.03(G), 8th Ed., Rev. 6 (September 2007).

Appellants respectfully submit that such rationale is not present in the rejection of record at least because the prior art references relied upon by the Examiner, i.e., *Mitsumatsu*, *Oshima*, and *Sebag*, when considered as a whole, provide no reason that would have prompted a person of ordinary skill in art to modify and combine the references in the manner suggested by the Examiner. In fact, for the reasons set forth below, Appellants submit that the modifications and combinations suggested by the Examiner lack the requisite expectation of success needed to render obvious the present claims.

II. *Mitsumatsu* does not disclose or suggest Appellants' claimed invention

Mitsumatsu does not disclose or suggest Appellants' claimed invention as recited

in independent claims 18, 47, 49, and 50. For example, *Mitsumatsu* does not disclose or suggest at least "[a] cosmetic composition ... wherein ... [a] C_{18} fatty alcohol and [a] C_{22} fatty alcohol are present in a ratio of 0.15 to 20," as recited in claim 18. This ratio of C_{18} fatty alcohol to C_{22} fatty alcohol is recited in each of independent claims 18, 47, 49, and 50. Indeed, *Mitsumatsu* does not disclose or suggest the use of **both** a C_{18} fatty alcohol and a C_{22} fatty alcohol, and the Examiner admitted this fact in the Final Office Action by stating that *Mitsumatsu* "does not provide a specific example which concurrently uses stearyl alcohol and behenyl alcohol in the ratio as required by instant claim 18." Final Office Action at 2.

III. The Proposed Combination of *Mitsumatsu* and *Oshima* Provides No Expectation of Success

In the Final Office Action, the Examiner relied on *Oshima* to allegedly overcome the deficiencies of *Mitsumatsu* and alleged that

> [i]t would have been obvious ... to modify [the] teaching of Mitsumatsu by using stearyl and behenyl alcohols in the weight ratio as motivated by Oshima, because 1) Mitsumatsu suggests using stearyl and behenyl alcohols with the weight amount which overlaps with Oshima; and 2) Oshima teaches the combination of the two fatty alcohols in a specific ratio in a shampoo ... which is stable and imparts excellent hair conditioning effect. The skilled artisan would have had a reasonable expectation of successfully producing a stable shampoo formulation.

Id. at 3. Further, the Advisory Action mailed September 8, 2009, alleged that

> the pending rejection properly indicated ... predictability because Oshima specifically teaches stability and effectiveness of the hair conditioning shampoo by utilizing the two fatty alcohols within the weight amount and ratio presently claimed by applicant.

Advisory Action, Continuation Sheet, page 2.

Appellants respectfully disagree with the allegations of the Final Office Action and the Advisory Action, and submit that at *prima facie* case of obviousness has not been established. The rejection of record apparently relied on the rationale that "some teaching, suggestion, or motivation in the prior art ... would have led one of ordinary skill to ... combine prior art reference teachings to arrive at the claimed invention." M.P.E.P. § 2143(G). However, as highlighted above, this rationale cannot be used if there would not have been a reasonable expectation of success to make the modifications suggested by the Examiner. See *Id.*

The Examiner in the Final Office Action did not articulate that, in the proposed combination of *Mitsumatsu* and *Oshima*, there was a reasonable expectation of success. Instead, the Examiner alleged that on the basis of a **single** reference's alleged teachings -- *Oshima's* alleged disclosure of "a shampoo ... which is stable and imparts excellent hair conditioning effect," to which Appellants do not accede -- "[t]he skilled artisan would have had a reasonable expectation of successfully producing a stable shampoo formulation." Final Office Action at 3. As explained above, however, reliance on the teachings of a single reference is **not** sufficient to establish an expectation of success. The expectation of success must relate to the proposed combination of references, and must consider the references in their entirety.

Appellants submit that there would **not** have been any expectation of success for the proposed combination of *Mitsumatsu* and *Oshima* in an attempt to achieve Appellants' claimed invention. This is at least due to the **unpredictability** associated with the ratio of stearyl alcohol to behenyl alcohol. As evidence of unpredictability, and a lack of an expectation of success, Appellants filed a Declaration under 37 C.F.R.

§ 1.132 of Sandrine DECOSTER on December 1, 2008 ("the DECOSTER Declaration"). The DECOSTER Declaration on page 3 described comparative Composition AA 904, with a ratio of stearyl alcohol to behenyl alcohol of 0.085 (outside the range recited in independent claim 18), and inventive Composition AA 905, with a ratio of 0.19 (within the range recited in claim 18). As shown in the DECOSTER Declaration, the viscosity of inventive Composition AA 905 was found to be **less temperature dependent** than the viscosity of comparative Composition AA 904. *See* the DECOSTER Declaration at 3-4. The difference in the temperature dependence of viscosity is an unpredictable result of modifying the ratio of stearyl alcohol to behenyl alcohol. Nothing in the prior art relied upon by the Examiner makes any mention of this difference in viscosity.

In the Advisory Action, the Examiner alleged that "[t]he issue here is whether it would have been obvious to incorporate *Oshima's* teaching in the present invention, not whether *Oshima* would have predicted the properties of the applicant's invention not explicitly covered by the prior art." Advisory Action dated September 8, 2009, Continuation Sheet, page 2. Appellants disagree and submit that predictability is precisely the issue in the rejection of record. As explained above, a rejection based on an alleged motivation to combine references also requires a reasonable expectation of success from the proposed combination. *See* M.P.E.P. § 2143(G). Contrary to the unsupported allegation by the Examiner in the Advisory Action, the DECOSTER Declaration presents objective evidence highlighting the unpredictability associated with modifying the ratio of stearyl alcohol to behenyl alcohol. And this unpredictability is, in fact, a determinative issue in assessing the non-obviousness of the presently claimed invention.

Because of the objective evidence of unpredictability that was presented in the DECOSTER Declaration, one of ordinary skill in the art could not have, from the combined teachings of *Mitsumatsu* or *Oshima*, predicted the properties of the combination proposed in the Final Office Action. As a consequence, one skilled in the art would not have had any expectation of success in attempting to achieve Appellants' claimed invention, based on the proposed combination of *Mitsumatsu* and *Oshima* suggested by the Examiner.

IV. *Sebag* Does Not Overcome the Deficiencies of Mitsumatsu and Oshima

Sebag is relied upon by the Examiner merely for its alleged disclosure "that the use of at least one fatty dialkyl ether used in the instant invention renders a washing foaming composition[] having insoluble silicones and surfactants, pearlescent effect, good homogeneity, and improved stability while maintaining foaming power. *See* Example 1, which comprises stearyl alcohol, suggesting the compatibility of the Sebag composition with higher fatty alcohols." Final Office Action at 3-4. The Final Office Action cites U.S. Patent No. 6,162,423 ("*Sebag 2*") as an English equivalent of *Sebag*. *Id.* at 3.

Appellants disagree with the Examiner's characterization of *Sebag*. Contrary to the Examiner's characterization in the Final Office Action, Example 1 of *Sebag* includes **cetyl**stearyl alcohol and stearyl alcohol **oxyethylentated with ethylene oxide**. Further, no other examples in *Sebag* use any form of stearyl alcohol, and *Sebag* does not disclose the use of behenyl alcohol or a composition comprising **both** stearyl and behenyl alcohols. *See Sebag 2*, col. 17, lines 36-60.

Moreover, *Sebag* does **not** overcome the deficiencies of *Mitsumatsu* and *Oshima*. For instance, one skilled in the art would not have had any reasonable expectation of success in combining *Mitsumatsu* and *Oshima* -- even with *Sebag* -- in an attempt to achieve Appellants' claimed invention. This is at least because, even considering *Sebag*, the results of modifying the ratio of stearyl alcohol to behenyl alcohol are not predictable.

Conclusion

For at least these reasons, independent claim 18 should be allowable over *Mitsumatsu*, *Oshima*, and *Sebag*. Independent claims 47, 49, and 50 differ in scope from claim 18 but recite similar limitations and should be allowable at least for reasons similar to those presented regarding claim 18. Claims 20-28, 30-46, 48, and 51 should also be allowable, at least due to their dependence from claim 18, 47, or 50. Appellants, therefore, respectfully request reconsideration and withdrawal of the rejection and the allowance of claims 18, 20-28, and 30-51.

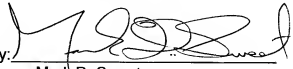
The undersigned may be contacted with any questions or comments.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this Appeal Brief, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: March 29, 2010

By: 

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Claims Appendix to Appeal Brief Under Rule 41.37(c)(1)(viii)

1-17. (Canceled)

18. (Previously Presented) A cosmetic composition comprising, in a cosmetically acceptable medium, at least one surfactant base, at least one saturated linear C_{22} fatty alcohol, at least one saturated linear C_{18} fatty alcohol present in said composition in an amount by weight ranging from 0.3% to 10%, relative to the total weight of said composition, and at least one of an opacifier and a pearlescent agent, wherein:

- said C_{18} fatty alcohol and said C_{22} fatty alcohol are present in a ratio of 0.15 to 20, and
- said at least one of an opacifier and a pearlescent agent is chosen from:

A) fatty dialkyl ethers which are solid at a temperature of less than or equal to 30°C;

B) alcohols containing from 27 to 48 carbon atoms and comprising one or two groups chosen from: ether, thioether and sulfoxide groups, wherein said alcohols correspond to formula (II):

$R1\text{-}X\text{-}[C_2H_3(OH)]\text{-}CH_2\text{-}Y\text{-}R2$ (II)

in which

R1 and R2, independently of each other, are chosen from linear C_{12} to C_{24} alkyl groups,

X is chosen from an oxygen atom, a sulfur atom, a sulfoxide, and a methylene group,

Y is chosen from an oxygen atom, a sulfur atom, a sulfoxide, and a methylene group,

with the provisos that:

when Y is a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 24 to 44 carbons inclusive,

when Y is not a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 24 to 44 carbons inclusive,

if either X or Y is sulfoxide, then the other of X or Y is not sulfur;

and

C) acyl derivatives chosen from ethylene glycol monostearate and ethylene glycol disearate.

19. (Canceled)

20. (Previously Presented) The composition according to claim 18, wherein when Y is a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 28 to 40 inclusive.

21. (Previously Presented) The composition according to claim 18, wherein when Y is not a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 28 to 40 inclusive.

22. (Previously Presented) The composition according to claim 18, wherein the fatty dialkyl ethers are chosen from dialkyl ethers of formula (I):

R-O-R' (I)

in which:

R and R', which may be identical or different, are chosen from saturated or unsaturated, linear or branched alkyl radicals comprising from 12 to 30 carbon atoms, R and R' being chosen such that the compound of formula (I) is solid at a temperature of less than or equal to 30°C.

23. (Previously Presented) The composition according to claim 22, wherein said alkyl radicals comprise from 14 to 24 carbon atoms.

24. (Previously Presented) The composition according to claim 22, wherein R and R' are identical.

25. (Previously Presented) The composition according to claim 18, wherein said at least one of an opacifier and a pearlescent agent is chosen from:

A) distearyl ether;

B) compounds of formula (II) in which X denotes oxygen, Y denotes methylene, and R1 and R2 denote radicals each containing 12 to 22 carbon atoms; and

C) ethylene glycol distearate.

26. (Previously Presented) The composition according to claim 18, wherein said saturated linear C_{22} fatty alcohol is present in said composition in an amount by weight ranging from 0.5% to 10%, relative to the total weight of said composition.

27. (Previously Presented) The composition according to claim 26, wherein said saturated linear C_{22} fatty alcohol is present in said composition in an amount by weight ranging from 0.5% to 5%, relative to the total weight of said composition.

28. (Previously Presented) The composition according to claim 27, wherein said saturated linear C_{22} fatty alcohol is present in said composition in an amount by weight ranging from 0.5% to 3%, relative to the total weight of said composition.

29. (Canceled)

30. (Previously Presented) The composition according to claim 18, wherein said saturated linear C_{18} fatty alcohol is present in said composition in an amount by weight ranging from 0.5% to 5%, relative to the total weight of said composition.

31. (Previously Presented) The composition according to claim 30, wherein said saturated linear C_{18} fatty alcohol is present in said composition in an amount by weight ranging from 0.5% to 3%, relative to the total weight of said composition.

32. (Previously Presented) The composition according to claim 18, wherein said C_{18} fatty alcohol and said C_{22} fatty alcohol are present in a ratio ranging from 0.2 to 20.

33. (Previously Presented) The composition according to claim 32, wherein said C_{18} fatty alcohol and said C_{22} fatty alcohol are present in a ratio ranging from 0.25 to 10.

34. (Previously Presented) The composition according to claim 33, wherein said C_{18} fatty alcohol and said C_{22} fatty alcohol are present in a ratio ranging from 0.3 to 5.

35. (Previously Presented) The composition according to claim 18, wherein said at least one of an opacifier and a pearlescent agent is present in said composition in an amount by weight ranging from 0.5% to 15%, relative to the total weight of said composition.

36. (Previously Presented) The composition according to claim 35, wherein said at least one of an opacifier and a pearlescent agent is present in said composition

in an amount by weight ranging from 1% to 5%, relative to the total weight of said composition.

37. (Previously Presented) The composition according to claim 18, wherein said at least one surfactant base is present in said composition in an amount by weight ranging from 1% to 60%, relative to the total weight of said composition.

38. (Previously Presented) The composition according to claim 37, wherein said at least one surfactant base is present in said composition in an amount by weight ranging from 3% to 40%, relative to the total weight of said composition.

39. (Previously Presented) The composition according to claim 38, wherein said at least one surfactant base is present in said composition in an amount by weight ranging from 5% to 30%, relative to the total weight of said composition.

40. (Previously Presented) The composition according to claim 18, wherein said composition further comprises at least one conditioner.

41. (Previously Presented) The composition according to claim 40, wherein said at least one conditioner is chosen from poly-α-olefins, fluoro oils, fluoro waxes, fluoro gums, carboxylic acid esters, silicones, cationic polymers, mineral, plant oils, animal oils, ceramides and pseudoceramides, and mixtures thereof.

42. (Previously Presented) The composition according to claim 40, wherein said at least one conditioner is present in said composition in an amount by weight ranging from 0.001% to 10%, relative to the total weight of said composition.

43. (Previously Presented) The composition according to claim 42, wherein said at least one conditioner is present in said composition in an amount by weight ranging from 0.005% to 5%, relative to the total weight of said composition.

44. (Previously Presented) The composition according to claim 43, wherein said at least one conditioner is present in said composition in an amount by weight ranging from 0.01% to 3%, relative to the total weight of said composition.

45. (Previously Presented) The composition according to claim 18, wherein said composition is in the form of a gel, a milk, a cream, a thickened lotion, or a mousse.

46. (Previously Presented) The composition according to claim 18, wherein said composition is a foaming detergent composition chosen from shampoos, shower gels and bubble baths.

47. (Previously Presented) A suspension agent for a conditioner which is insoluble in a cosmetic composition, said suspension agent comprising at least one saturated linear C_{22} fatty alcohol, at least one saturated linear C_{18} fatty alcohol present in said composition in an amount by weight ranging from 0.3% to 10%, relative to the total weight of said composition, and at least one of an opacifier and a pearlescent agent, wherein:

- said C_{18} fatty alcohol and said C_{22} fatty alcohol are present in a ratio of 0.15 to 20, and
- said at least one of an opacifier and a pearlescent agent is chosen from:

A) fatty dialkyl ethers which are solid at a temperature of less than or equal to 30°C;

B) alcohols containing from 27 to 48 carbon atoms and comprising one or two groups chosen from: ether, thioether and sulfoxide groups, wherein said alcohols correspond to formula (II):

R1-X-[C_2H_3(OH)]-CH_2-Y-R2 **(II)**

in which

R1 and R2, independently of each other, are chosen from linear C_{12} to C_{24} alkyl groups,

X is chosen from an oxygen atom, a sulfur atom, a sulfoxide, and a methylene group,

Y is chosen from an oxygen atom, a sulfur atom, a sulfoxide, and a methylene group,

with the provisos that:

when Y is a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 24 to 44 carbons inclusive,

when Y is not a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 24 to 44 carbons inclusive,

if either X or Y is sulfoxide, then the other of X or Y is not sulfur; and

C) acyl derivatives chosen from ethylene glycol monostearate and ethylene glycol disearate.

48. (Previously Presented) The suspension agent according to claim 47, wherein said cosmetic composition is a foaming conditioning and washing composition containing, in a cosmetically acceptable aqueous medium, a surfactant base.

49. (Previously Presented) A method for giving a pearlescent effect to or improving the pearlescent effect of a composition comprising at least one of an opacifier

and a pearlescent agent, and optionally at least one surfactant base, said method comprising combining at least one saturated linear C_{22} fatty alcohol and at least one saturated linear C_{18} fatty alcohol present in said composition in an amount by weight ranging from 0.3% to 10%, relative to the total weight of said composition, wherein:

- said C_{18} fatty alcohol and said C_{22} fatty alcohol are present in a ratio of 0.15 to 20, and
- said at least one of an opacifier and a pearlescent agent is chosen from:

A) fatty dialkyl ethers which are solid at a temperature of less than or equal to 30°C;

B) alcohols containing from 27 to 48 carbon atoms and comprising one or two groups chosen from: ether, thioether and sulfoxide groups, wherein said alcohols correspond to formula (II):

$R1\text{-}X\text{-}[C_2H_3(OH)]\text{-}CH_2\text{-}Y\text{-}R2$ (II)

in which

R1 and R2, independently of each other, are chosen from linear C_{12} to C_{24} alkyl groups,

X is chosen from an oxygen atom, a sulfur atom, a sulfoxide, and a methylene group,

Y is chosen from an oxygen atom, a sulfur atom, a sulfoxide, and a methylene group,

with the provisos that:

when Y is a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 24 to 44 carbons inclusive,

when Y is not a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 24 to 44 carbons inclusive,

if either X or Y is sulfoxide, then the other of X or Y is not sulfur; and

C) acyl derivatives chosen from ethylene glycol monostearate and ethylene glycol disearate.

50. (Previously Presented) A method for treating a keratin material comprising applying to said keratin material a composition comprising, in a cosmetically acceptable medium, at least one surfactant base, at least one saturated linear C_{22} fatty alcohol, at least one saturated linear C_{18} fatty alcohol present in said composition in an amount by weight ranging from 0.3% to 10%, relative to the total weight of said composition, and at least one of an opacifier and a pearlescent agent, optionally followed by rinsing with water, wherein:

- said C_{18} fatty alcohol and said C_{22} fatty alcohol being present in a ratio of 0.15 to 20, and
- said at least one of an opacifier and a pearlescent agent is chosen from:

A) fatty dialkyl ethers which are solid at a temperature of less than or equal to 30°C;

B) alcohols containing from 27 to 48 carbon atoms and comprising one or two groups chosen from: ether, thioether and sulfoxide groups, wherein said alcohols correspond to formula (II):

$R1\text{-}X\text{-}[C_2H_3(OH)]\text{-}CH_2\text{-}Y\text{-}R2$ (II)

in which

R1 and R2, independently of each other, are chosen from linear C_{12} to C_{24} alkyl groups,

X is chosen from an oxygen atom, a sulfur atom, a sulfoxide, and a methylene group,

Y is chosen from an oxygen atom, a sulfur atom, a sulfoxide, and a methylene group,

with the provisos that:

when Y is a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 24 to 44 carbons inclusive,

when Y is not a methylene group, the sum of the number of carbon atoms present in the groups R1 and R2 combined ranges from 24 to 44 carbons inclusive,

if either X or Y is sulfoxide, then the other of X or Y is not sulfur; and

C) acyl derivatives chosen from ethylene glycol monostearate and ethylene glycol disearate.

51. (Previously Presented) A method according to claim 50, wherein said keratin material is hair.

Evidence Appendix to Appeal Brief Under Rule 41.37(c)(1)(ix)

Appellants rely on the Declaration under 37 C.F.R. § 1.132 of Sandrine DECOSTER previously filed December 1, 2008. A copy of this Rule 132 Declaration is attached for the Examiner's convenience.

Related Proceedings Appendix to Appeal Brief Under Rule 41.37(c)(1)(x)

No related proceeding decisions are cited in this appeal.

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PATENT
Customer No. 22,852
Attorney Docket No. 05725.0993-00000

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:	
Sandrine DECOSTER et al.	Group Art Unit: 1617
Application No.: 10/018,769	Examiner: Gina C. Yu
Filed: December 21, 2001	
For: COMPOSITION CONTAINING AN OPACIFIER OR PEARLESCENT AGENT AND AT LEAST TWO FATTY ALCOHOLS	Confirmation No.: 2464

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

DECLARATION UNDER 37 C.F.R. § 1.132

I, Sandrine Decoster do hereby make the following declaration:

1. I am a French citizen, residing at 20, avenue Ernst Renan, F-95210 Saint Gratien, France.

2. I have been awarded Hautes Etudes Industrielles (HEI) Engineer.

3. I have been employed by L'ORÉAL since 1991 and currently hold the position of Head of Haircare Development - France.

4. I understand the rejections made in the Final Office Action mailed October 29, 2007, in Application No. 10/018,769.

5. Given my education and experience, particularly in the area of hair conditioning, I consider myself able to provide the following testimony based on experiments conducted by me or under my supervision:

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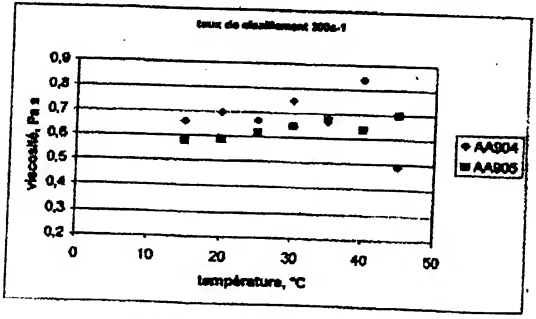
COMPARATIVE TEST

	AA 904 C18/C22=0.085 C18+C22=3.3	AA 905 (Ivention) C18/C22=0.19 C18+C22=3.3
lauryl ether sulfate de sodium oxyethylene à 2.2 moles d'OE à 70%MA	20 g (14% MA)	20 g (14% MA)
SodiumN-cocoyl amidoethyl, N-ethoxycarboxymethyl glycynate sodium à 39%MA	10.25 g (4% MA)	10.25 g (4% MA)
sodium cetearyl sulfate	0.75 g	0.75 g
Stearylic alcohol 10 OE	0.80 g	0.80 g
Distearylether	4.0 g	4.0 g
behenyl alcohol	3,04 g	2,77 g
Stearyl alcohol	0,26 g	0.53 g
hydroxypropyl guar trimethyl ammonium chloride	0.2 g	0.2 g
Dimethicone	2.6 g	2.6 g
Preservatives	qs	qs
Water QSP	100 g	100 g
Citric acid QSP	pH = 5	pH ~ 5



The viscosity of the compositions is measured using a VT 550 Viscotester sold by Rheo at a shear rate of 300 s^{-1} and at several temperatures.

Composition AA 904 is a comparative composition, whose ratio of C18:C22 fatty acids (0.085) is outside Applicants' claimed range. Composition AA 905 has a ratio of C18:C22 fatty acids (0.19) that is in accordance with Applicants' claimed invention. The viscosity of Composition AA 905 was observed to be less temperature-dependent than comparative Composition AA 904

6. I further declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true, and further, that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any patent issuing thereon.

Dated: ~~July~~ September 03, 2008

By: S. DeGoyen